IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JAIPUR BENCH, JAIPUR

ORDER

1. *S.B.CIVIL WRIT PETITION NO.4412/1996.*
Shree Cements Limited. **VERSUS** I.D.B.I. & Another.

2. *S.B.CIVIL WRIT PETITION NO.1158/1999.*
Shree Cements Limited. **VERSUS** U.O.I. & Another.

06.11.2006.

HON'BLE MR.JUSTICE DALIP SINGH

Ms.Susan Timothy, for the petitioner.
Mr.V.K.Joshi on behalf of
Mr.Bhanwar Bagri, for the respondent-U.O.I.

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In these writ petitions, the petitioner has challenged the demand notice issued by the respondent No.1 under Rule 6 of the Research and Development Cess Rules, 1987 framed under the Research and Development Cess Act, 1986 (hereinafter referred to as "the Act of 1986") holding as to why the petitioner should not be saddled with the liability of Cess under Section 3 of the Act of 1986 and penalty for the import of technology as defined under Section 2(h) of the Act of 1986.

The petitioner's case is that the petitioner did not enter into any collaboration with the foreign firm but merely entered into a contract of sale for the import of plant and machinery and for the installation of which the foreign firm also supplied the drawings and designs.

Learned counsel appearing on behalf of the petitioner submits that the Calcutta High Court in the

similar circumstances in the case of Indian Oxygen and Another Vs. Union of India and Others [Writ Petition No.2261 of 1989] decided on 13.03.1992 has held that the import of supervisory personnel made in pursuance of the contracts for purchase of plant and machinery does not fall within the purview of the definition of 'technology' as provided under Section 2(h) of the Act of 1986 so as to attract the levy of Cess under the Act of 1986.

Learned counsel appearing on behalf of the respondents, on the other hand, has submitted that the petitioner has merely filed this writ petition challenging the show cause notice and no determination has taken place in terms of the Section 2(h) of the Act of 1986 defining 'technology' as to whether the petitioner had entered into an agreement for collaboration or an agreement of sale for the purchase of technology as distinct from the collaboration. It is submitted that the pre-requisite for the levy of Cess would be adjudicated by the competent authority on the question as to whether or not there was a contract for collaboration entered into by the petitioner with the foreign firm. It is further submitted that since the said adjudication involves determination of the question of fact the same cannot be adjudicated in the writ jurisdiction under Article 226 of the Constitution of India.

I have given my thoughtful consideration to the rival submission and I am inclined to accept the contention of the learned counsel for the respondent that present writ petition having been filed directly

against the notice without there being any adjudication regarding the facts, the determination of the applicability of the provisions of Section 3 of the Act of 1986 cannot be made by this court under the writ jurisdiction under Article 226 of the Constitution of India. Since the basic question which arises is whether or not the contract in question is a contract for the supply of the plant and machinery being the goods or the contract is one for the collaboration with the foreign firm for setting up the plant and machinery by import of technology for which the designs and drawings have been provided by the foreign firm. That is a question of fact to be determined on the basis of the material produced by the parties before the competent authority.

In view of the above, I am of the opinion that the judgment of the Calcutta High Court is merely applicable in a case where no collaboration is proved but in the facts and circumstances of the present case, it is yet to be determined by the competent authority on the question to be adjudicated for the purposes of Section 2 (h) of the Act of 1986 as to whether or not there is a contract with the foreign firm for import of technology, which is yet to be adjudicated. This writ petition, therefore, is pre-mature and consequently I am inclined to uphold the objection raised by the respondents and dismiss the writ petition with direction to the assessing authority to determine the question in the light of the judgment of the Calcutta High Court on the basis of the facts which may be place on record before it. The petitioner shall appear before the competent authority with the certified copy of this order within a period of two months and the competent authority is

expected to hold an inquiry and decide the matter within a period of three months.

Consequently, both the writ petitions stand disposed of, as above. It is, however, clarified that the dismissal of this writ petition does not reflect any expression of opinion on the merits of the case. Till the matter is decided no recovery of Cess shall be made.

(DALIP SINGH),J.

Solanki DS, Jr.P.A.